7-21-2011

Hobson Manufacturing Corp. v. SE/Z Const. Appellant's Brief 1 Dckt. 38202

IN THE SUPREME COURT OF THE STATE OF IDAHO

HOBSON FABRICATING CORP., an Idaho corporation,

Plaintiff / Appellant,

v.

STATE OF IDAHO, acting by and through its DEPARTMENT OF ADMINSTRATION, Division of Public Works,

Defendant / Counter Crossclaimant / Respondent,

and

SE/Z CONSTRUCTION, LLC, an Idaho limited liability company,

Defendant / Appellant.

Supreme Court Docket No. 38202-2010

Supreme Court Docket No. 38216-2010

APPELLANT SE/Z CONSTRUCTION, LLC'S BRIEF

Appeal from the District Court of the First Judicial District for Kootenai County
Honorable Ronald J. Wilper, District Judge, Presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case

This case involves the determination of the prevailing party, attorney fees and costs pursuant to Idaho Code § 12-117. This Court exercises free review over all aspects of the determination of entitlement to fees and costs under section 12-117. *Rincover v. State of Idaho Dept. of Finance*, 132 Idaho 547, 548-49, 976 P.2d 473, 474-75 (1999). Section 12-117 is a mandatory attorneys fee provision which requires an award of attorney fees and costs in certain cases to either the overall prevailing party under subsection (1) of the statute, or to a partially prevailing party under subsection (2), if the non-prevailing party acted without a reasonable basis in fact or law.

This case arises out of the termination for convenience of a construction contract between the Respondent State of Idaho, Department of Administration, Division of Public Works ("DPW" or the "State") and the Cross-Appellant SE/Z Construction, LLC ("SE/Z")[1]. SE/Z and DPW entered into a competitively bid fixed price construction contract (the "Contract") for the construction of Bio Safety Level 3 Laboratory (the "Project"). Appellant Hobson Fabricating Corporation ("Hobson") was one of SE/Z's primary subcontractors on the Project.[2] SE/Z and Hobson are referred to collectively herein as the "Contractors." In this appeal SE/Z submits that DPW acted without a

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[1] DPW also terminated for convenience the contract of its Project architect Rudeen and Associates, a Professional Company ("Rudeen").

[2] While SE/Z supports Hobson's request for an award of attorney fees and costs against DPW, the focus of SE/Z's appeal is its own attorneys fee entitlement against with DPW. SE/Z's assertion that it is the overall prevailing party over DPW is not meant to imply that Hobson cannot also be a prevailing party over DPW.

reasonable basis in fact or law in pursuing cross-claims and counterclaims, which were eventually valued by DPW at over three million dollars. DPW's claims were based upon an unreasonable interpretation of the clear and unambiguous construction contract. Particularly, (1) DPW admittedly terminated the construction contract "for convenience," and then it sought to recover damages that could only be recovered if the termination had been "for cause," and (2) DPW admittedly did not provide SE/Z with prior written notice of its claims, nor did it provide SE/Z with any opportunity to correct the alleged defects, many of which DPW raised years after the termination. Contrary to the clear and unambiguous terms of the Contract and existing law, DPW argued that written notice of its claims was not required under the Contract.

SE/Z submits that it was the prevailing party because, shortly after the District Court rejected DPW's interpretations of the clear and unambiguous contract and barred all of DPW's cross-claims, SE/Z recovered $225,000 from DPW through settlement on the eve of the second trial. At the time of settlement, all of SE/Z's causes of action remained viable.

Notwithstanding SE/Z's substantial recovery and the complete barring of DPW's cross-claim against SE/Z, the District Court concluded that the contractors and DPW prevailed in part, and therefore denied any award of costs and fees. SE/Z submits that the District Court erred as a matter of law in failing to award SE/Z its cost and attorneys fees; alternatively it abused its discretion when it denied SE/Z an award of fees and costs, because it failed to conduct *any* analysis under I.C. § 12-117(2) to determine whether SE/Z should be awarded costs and fees against DPW as the partially

prevailing party. SE/Z further submits that this Court should not confine its review to the partially prevailing party analysis, but should exercise free review to conclude that SE/Z was in fact the overall prevailing party, not just a partially prevailing party, and that SE/Z is entitled to an award of attorney fees and costs pursuant to I.C. § 12-117(1).

B. Course of Proceedings Below

Nearly five months after DPW terminated both its contract with the design professional, Rudeen, and the Contract with SE/Z "for convenience," Hobson filed this Action on October 25, 2005 against SE/Z to assert pass through claims as well as direct claims against DPW. (R. Vol. I, p. 35.) SE/Z filed its Answer and Cross-Claim against DPW on November 21, 2005. (R. Vol I, p. 63, 71.) On December 9, 2005, DPW filed Answers, as well as a Counter-Cross-Claim against SE/Z and a Counterclaim against Hobson. (R. Vol. I, p. 88 - 105.) DPW also filed a Third-Party Complaint against Rudeen. (R. Vol. I, p. 115.) Finally, Hobson filed a separate Complaint against certain DPW individual defendants asserting defamation and tortious interference claims. (R. Vol. I, p. 193), which action was consolidated with this matter. (R. Vol. II, p. 200.)

Throughout the course of the litigation, SE/Z and Hobson filed and argued nearly a dozen motions seeking to enforce the parties' Contract and eliminate DPW's claims as inappropriate under the Contract. SE/Z and Hobson filed a motion for summary judgment regarding the preclusive effect of DPW's election to terminate the Contract for convenience, (R. Vol. II, p. 212); a motion for summary judgment regarding DPW's failure to provide notice of its "claims," (R. Vol. II, p. 238);

and a motion to reconsider the District Court's denial of the notice motion, (Motion to Augment pending). On December 18, 2007, SE/Z filed a motion to appeal by permission as to the contract notice issues, which was denied on February 1, 2008. (Motion to Augment pending). Finally, just before trial in this matter SE/Z brought a Motion in Limine regarding DPW's failure to provide SE/Z with notice and an opportunity to cure potential and alleged construction defects, (R. Vol. II, p. 288 A-TT), and then a motion to reconsider the denial of the Motion in Limine, (R. Vol. II, p. 288-UU). In response to each of SE/Z's and Hobson's motions regarding notice under and enforcement of the Contract, DPW essentially asserted there was an issue of fact for trial.

A jury trial was commenced on October 15, 2008, and continued for 11 trial days, which ultimately ended in the District Court declaring a mistrial due to the length of time the trial would likely require. (R. Vol. III, p. 437 - 438.) The District Court's decision to declare a mistrial occurred shortly after the cross examination of SE/Z's Steve Zambarano, during which DPW's counsel essentially identified for the District Court and jury that DPW's "notice" under the various provisions of the Contract was met by way of service of its Counter-Cross-Claim against SE/Z. (Tr. Zambarano cross examination p. 290-302). It became apparent at trial, that DPW's argued compliance with the notice provisions of the parties' Contract was only by way of its Counter-Cross-Claim. *Id.*

As the date to commence the retrial approached, the Contractors again filed Motions in Limine again seeking to enforce the notice provisions of the Contract, which the Court ultimately

granted, barring DPW's cross-claims and offsets. R. Vol. IV, p. 619-629. Finally, when the court reexamined the notice issue, it agreed with the Contractors' position and barred DPW's cross-claim.[3]

Shortly after the court's ruling and its denial of DPW's motion to reconsider its ruling, the parties settled SE/Z's claim, reserving out the issue of prevailing party attorneys fees. R. Vol. IV, p. 746. Thereafter, the court denied attorneys fees to the Contractors, determining that there was no overall prevailing party. (R. Vol. VIII, p. 1554-1561.)

C. Concise Statement of Facts.

SE/Z concurs with, adopts and incorporates by reference the Concise Statement of Facts presented by Hobson in its Opening brief in the appeal. In support of this appeal, SE/Z relies principally on the language of the Contract, the District Court's prior rulings and the procedural history set forth above. For the Court's convenience, SE/Z has attached relevant portions of the Contract between DPW and SE/Z as addenda to this brief. Attached as Addendum 1 are Articles 4, 12 and 14 of the General Conditions to the Contract as well as the supplemental conditions modifying those articles.

II. ISSUES PRESENTED ON APPEAL

A. Whether the District Court erred in failing to find, pursuant to I.C. § 12-117, that SE/Z was the overall prevailing party entitled to an award of attorney fees and costs against DPW, where SE/Z recovered $225,000 in settlement from DPW shortly after the District Court barred all of DPW's cross-claims, and where all of SE/Z's causes of action remained viable at the time of settlement.

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[3] The court had previously dismissed on summary judgment Hobson's direct claims against DPW and DPW's counterclaims against Hobson, leaving only DPW's cross-claims.

B. Whether the District Court erred in failing to analyze and conclude pursuant to I.C. § 12-117 that DPW acted without a reasonable basis in fact or law by fabricating unreasonable and unsupported interpretations of a clear and unambiguous construction contract.

C. In the alternative, whether the District Court erred in failing to find that SE/Z was entitled to an award of attorney fees and costs as a partially prevailing party pursuant to I.C. § 12-117(2), based upon those portions of the case in which SE/Z prevailed and DPW acted without a reasonable basis in fact or law.

D. In the further alternative, if this Court applies an abuse of discretion standard of review, whether the District Court abused its discretion in failing to find that SE/Z was the overall or partial prevailing party, entitled to an award of its reasonable attorney fees and costs, in whole or in part, pursuant to I.C. § 12-117.

III. ATTORNEY FEES ON APPEAL

Attorneys fees on appeal in this matter are governed by I.A.R. 41 and Idaho Code § 12-117. SE/Z therefore requests an award of its attorney fees on appeal pursuant thereto if it is the prevailing party on appeal. Section 12-117 requires an award of attorney fees and costs to the prevailing party if the non-prevailing party acted without a reasonable basis in fact or law. SE/Z adopts and incorporates herein by reference the arguments presented below in support of it's request for an award of attorney fees on appeal. The State of Idaho has acted without a reasonable basis in fact or law in its perpetuation of the unreasonable and unsupported interpretations of the clear and unambiguous construction contract argued to the District Court, thereby unreasonably requiring SE/Z to pursue this appeal. There is simply no basis in fact or law under which DPW can reasonably claim that SE/Z was not he prevailing party below. Therefore, its opposition to this appeal is likewise without a basis in fact or law, and SE/Z respectfully submits that it should be awarded its

fees on appeal pursuant to I.C. § 12-117.

IV. ARGUMENT

SE/Z appeals from the District Court's Memorandum Decision and Order on Prevailing Party, Costs and Attorney Fees, entered on September 15, 2010. SE/Z submits that the District Court committed reversible error in failing to find, as a matter of law, that SE/Z was the overall prevailing party against DPW in this action. SE/Z further submits that, because DPW acted without a reasonable basis in fact or law, the District Court erred as a matter of law when it denied SE/Z an award of its reasonable costs and attorney fees, rather than apply an analysis required under Idaho Code § 12-117. Even if SE/Z somehow was not the overall prevailing party against DPW, the District Court was required by section 12-117(2) to make an award of attorney fees and costs to SE/Z for those portions of the case in which it did prevail.

A. Standard of Review

This Court exercises free review over all aspects of the determination of an entitlement to fees and costs under Idaho Code § 12-117. *Rincover v. State of Idaho Dept. of Finance*, 132 Idaho 547, 548-49, 976 P.2d 473, 474-75 (1999). Section 12-117 provides for an award of fees and costs in an action between a state agency and a person where the non-prevailing party acted without a reasonable basis in fact or law. *Id.*

For several years following the enactment of I.C. § 12-117, the standard of review that was applied on appeal regarding fees and costs under section 12-117 varied widely, with the courts

sometimes applying an abuse of discretion or a clearly erroneous/substantial evidence standard, and other times applying a *de novo* or free review standard. *See, Rincover*, 132 Idaho at 548-49, 976 P.2d at 474-75 (discussing the prior inconsistencies). In 1999, this Court settled the standard of review by holding in *Rincover* that the *de novo* standard, or "free review," applies to all decisions regarding attorney fees under section 12-117. *Id.* at 549, 976 P.2d at 475.

The "free review" standard applies to *all* aspects of an award of fees pursuant to section 12-117, including the determination of the prevailing party. *See, Id.* at 549-50, 976 P.2d at 475-76 (explaining that the prevailing party under section 12-117 is more in the nature of a legal conclusion, and then identifying the prevailing party without reference to, or analysis of, the trial court's findings). *See also, e.g., Fischer v. City of Ketchum*, 141 Idaho 349, 356, 109 P.3d 1091, 1098 (2005) (applying "free review" and making a determination of the prevailing party without reference to the trial court's findings); and *Reardon v. City of Burley*, 140 Idaho 115, 118-19, 90 P.3d 340, 343-44 (2004) (same).

Therefore, the abuse of discretion standard that may be applicable in other contexts does not apply in this case. This Court should exercise a free review of the facts and proceedings of this case to make its own determination—without any deference to the District Court's findings—whether SE/Z was the prevailing party over DPW, and whether SE/Z is entitled to an award of attorney fees and costs against DPW pursuant to I.C. § 12-117. As argued last in this brief, even if the abuse of discretion standard applied to any party of this appeal, the District Court's failure to conclude that

SE/Z was the overall prevailing party over DPW and its failure to award *any* attorney fees or costs to SE/Z, whether as an overall or a partially prevailing party, was a reversible abuse of discretion.

B. The District Court Failed to Properly Analyze and Apply I.C. § 12-117 and Conclude That SE/Z Is the Prevailing Party, Entitled to an Award of Costs and Attorney Fees Against DPW.

Idaho Code § 12-117 provides the sole basis for and award of attorney fees and costs in an action between a state agency and a person. *See, e.g., Westway Constr., Inc. v. Idaho Transp Dept.*, 139 Idaho 107, 116, 73 P.3d 721, 730 (2003). Idaho Code § 12-117 requires an award of fees to the prevailing party if the non-prevailing party "acted without a reasonable basis in fact or law." Section 12-117 provides, in pertinent part:

> (1) Unless otherwise provided by statute, in any administrative proceeding or civil judicial proceeding involving as adverse parties a state agency or political subdivision and a person, the state agency or political subdivision or the court, as the case may be, ***shall*** award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party *acted without a reasonable basis in fact or law*.
>
> (2) If a party to an administrative proceeding or to a civil judicial proceeding prevails on a *portion* of the case, and the state agency or political subdivision or the court, as the case may be, finds that the nonprevailing party acted without a reasonable basis in fact or law *with respect to that portion* of the case, it ***shall award*** the *partially prevailing party* reasonable attorney's fees, witness fees and other reasonable expenses with respect to that portion of the case on which it prevailed. . . .

I.C. § 12-117 (emphases added). There is no dispute that DPW falls within the meaning of a "state agency" and that SE/Z and Hobson fall within the meaning of a "person" as used in the statute. I.C.

§§ 12-117(4) and 67-5201. Therefore, section 12-117 provides the exclusive basis for attorney fees and costs between SE/Z and DPW. *Westway Constr.*, 139 Idaho at 116, 73 P.3d at 730.

Idaho Code § 12-117 is not a discretionary statute, but rather, it mandates an award of attorney fees and costs to the overall prevailing party, or to a party who prevails in a portion of the case, where the non-prevailing party "did not act with a reasonable basis in fact or law." *Rincover v. State of Idaho Dept. of Finance*, 132 Idaho 547, 549, 976 P.2d 473, 475 (1999); I.C. § 12-117(1). This Court has held that the purpose of I.C. 12-117 is to deter baseless conduct and provide fairness. The Court has succinctly stated I.C. § 12-117 is:

> (1) to serve as a deterrent to groundless or arbitrary agency action; and (2) to provide a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies never should ha[ve] made.

Bogner v. State Dep't of Revenue and Taxation, 107 Idaho 854, 859, 693 P.2d 1056, 1061 (1984) (citations omitted); see also. *Rincover*, 132 Idaho at 549, 976 P.2d at 475.

SE/Z submits that the District Court erred when it failed to conclude that SE/Z was the overall prevailing party over DPW and wholly denied SE/Z's request for an award of attorney fees pursuant to I.C. § 12-117.

1. SE/Z Was the Overall Prevailing Party, Because None of SE/Z's Claims for Relief Were Dismissed, SE/Z Recovered $225,000 from DPW, and SE/Z Defeated All of DPW's Cross-claims.

The District Court's conclusion that each of the parties prevailed in part should be reversed. In this Court's exercise of free review regarding the prevailing party in this action, the Court should

"consider the final judgment or result of the action in relation to the relief sought by the respective parties." IRCP 54(d)(1)(B).

SE/Z submits that it was the overall prevailing party over DPW. The relief sought by SE/Z and DPW, respectively in this action, is central to the prevailing party analysis, and demonstrates the degree to which SE/Z prevailed in this action. IRCP 54(d)(1)(B). In its cross-claim, SE/Z sought to recover from DPW an unspecified amount of contract damages and pass-through damages arising from Hobson's claim against DPW through SE/Z. (R. Vol. I, pp. 75-77.) In its answer to SE/Z's cross-claim, DPW asserted as affirmative defenses that the amount of SE/Z's cross-claim was offset by alleged defective work. DPW's "Ninth Defense" declared "SE/Z's claims . . . are offset by the costs incurred by the State to correct defective work performed by SE/Z and its subcontractors . . . ." R. Vol. I, p. 93.) DPW's "Tenth Defense" similarly declared: "SE/Z cannot recover on its claims . . . because the defects in the work on the Project were so extensive as to render its [claims] unreasonable." (Id.)

Similarly, in its cross-claim against SE/Z, DPW requested "damages resulting from the deficiencies in construction and delays," as well as liquidated damages. (R. Vol. I, p. 112; *see also* p. 109 at ¶¶ 16-18; p. 110 at ¶¶ 22-23, 27-28; and p. 111 at ¶ 33.). Even though DPW did not state the total amount of damages it sought, it described its alleged deficiency and delay damages as being "commensurate with the original contract price." (Id. at p. 109, ¶ 15). The original contract price on the Project was $1,314,883.00. (R. Vol. II, p. 331.) Thus, the amount of damages sought by

DPW, even without considering its claim for liquidated damages, was well over a million dollars.

After nearly five years of litigation, including 11 days of trial, all of DPW's cross-claims against SE/Z were barred by the District Court. Shortly thereafter, the case settled with DPW paying $225,000 to SE/Z. Notably, all of SE/Z's causes of action remained viable at the time of settlement.[4] SE/Z submits that a recovery of $225,000 is a substantial recovery. A party who receives a favorable settlement outcome qualifies as a prevailing party for the purpose of determining fees and costs unless the settlement agreement states otherwise. *Straub v. Smith*, 145 Idaho 65, 69, 175 P.3d 754, 758 (2007) (applying general contract principles and the intent of the parties to the agreement). In the settlement agreement in this case, the parties expressly reserved the issue of "the taxation of costs and attorneys' fees." (R. Vol. IV, p. 746-749.) Thus, SE/Z may properly be found as a prevailing party in light of the settlement, and the court may properly award fees to SE/Z as the prevailing party.

Compared with the relief sought by the parties, SE/Z's $225,000 recovery represents a significant victory in this case, particularly when gauged by DPW's outcome. Even though DPW (significantly through Rudeen's efforts) succeeded in reducing some of the damages sought by SE/Z through summary judgment, DPW never successfully defeated any of SE/Z's claims for relief, all of which remained viable at the time of settlement. *See, e.g., Decker v. Homeguard Sys*, 105 Idaho

[4] Even though SE/Z demanded payment of a greater amount prior to filing suit, this Court recently reaffirmed its long-standing rule that the amount or even the existence or nonexistence of prior offers is not proper for a court to consider in determining the prevailing party. *Jorgensen v. Coppedge*, 148 Idaho 536, 541-42, 224 P.3d 1125, 1130-31 (2010).

158, 160-61, 666 P.2d 1169, 1171-72 (Ct. App. 1983), (Plaintiffs were prevailing parties even though 22 of 28 causes of action were dismissed and they were awarded only 3% of the total recovery sought); *Collins v. Jones*, 131 Idaho 556, 559, 961 P.2d 647, 650 (1998) ("We do not believe that merely because Collins received less than the entire amount of damages requested, she is therefore not a prevailing party"); *See also Lunders v. Estate of Snyder*, 131 Idaho 689, 699-700, 963 P.2d 372, 382-83 (1998). (The fact that Plaintiff recovered on 23% of amount sought in complaint did not require a reduction in fees). Accordingly, the District Court erred in finding that SE/Z prevailed only in part and this Court should conclude that SE/Z was the overall prevailing party.

Likewise, the District Court's finding that DPW prevailed in part is not supported by law or the evidence. SE/Z is unaware of any Idaho case where a party has been found to be a prevailing party when all of its counterclaims—exceeding a million dollars—were barred; and where the party failed to have any of the opposing party's claims dismissed; and who ultimately paid the opposing party hundreds of thousands of dollars. DPW simply did not prevail in part of the action, and SE/Z should be determined as the overall prevailing party in this action.

2. DPW Acted Without a Reasonable Basis in Fact or Law by Fabricating an Unsupported and Unreasonable Interpretation of its own Clear and Unambiguous Construction Contract.

DPW acted without a reasonable basis in fact or law, because its multiple counterclaims and crossclaims against SE/Z relied upon its strained construction of its own clear and unambiguous

construction Contract. The parties' Contract was drafted by DPW, meaning that any so-called ambiguities would have been construed against DPW anyway. *Straub,* 145 Idaho at 69, 175 P.3d at 758; *Win of Michigan, Inc. v. Yreka United, Inc.,* 137 Idaho 747,751, 53 P.3d 330, 334 (2002). DPW's unreasonable interpretations of the Contract caused SE/Z and Hobson to expend hundreds of thousands of dollars that would not have been otherwise necessary to defend against DPW's counterclaims and cross-claims. The fact that DPW was initially successful in convincing the District Court to accept its erroneous arguments is immaterial to whether it acted reasonably. *Lockhart v. Dept. Fish and Game*, 121 Idaho 894, 828 P.2d 1299, (1992) ("Notwithstanding the Department was defending a favorable judgment of the District Court, under *Moosman* we conclude the motion to dismiss for lack of jurisdiction was made without a reasonable basis in law or fact and Lockhart is entitled to an award of attorney fees.").

First and foremost as identified in SE/Z's First Motion for Summary Judgment, DPW's claims were barred by the terms of its own Contract by virtue of the termination for convenience. Under Article 14 of the Contract, DPW precluded any claims against the Contractors when it terminated for convenience.

Even if the Contract was susceptible to the interpretations propounded by DPW, thereby rendering the Contract ambiguous, those ambiguities must be construed against DPW, effectively nullifying its interpretation. *Straub,* 145 Idaho at 69, 175 P.3d at 758; *Win of Michigan,* 137 Idaho at 751, 53 P.3d at 334. Therefore, DPW's reliance upon its interpretations of its own Contract had

no basis in fact or law. Indeed, even if DPW's interpretation was considered reasonable, the law requires that it be construed according to SE/Z's reasonable conflicting interpretation, *Id.*, thereby making DPW's reliance on its interpretation of the Contract patently unreasonable.

In *Win of Michigan, Inc. v. Yreka United, Inc.*, the parties who drafted the contract at issue in the litigation, Win and Miller, sought relief based upon an ambiguity in a stipulation between the parties. The District Court denied their relief. 137 Idaho 747, 750-51, 53 P.3d 330, 333-34 (2002). On appeal, this Court agreed with Win and Miller that the contract was ambiguous, but held that "[n]otwithstanding the ambiguity" the terms of the stipulation also supported the opposing party's position, and "we construe the contract most strongly against the person who prepared the contract. Win/Miller, therefore, must bear the responsibility for indefiniteness of the terms." *Id.* at 751, 53 P.3d at 334.

From the very first dispositive motion in the case, DPW took an unreasonable and unsupported position. First, DPW refused to acknowledge that its election to terminate the Contract for convenience foreclosed its rights to recover any of its alleged "claims." Rather, DPW argued that it was entitled to terminate a fixed price contract for convenience, hire an expert witness, and follow-on contractor (on a cost plus basis) and thereafter seek to recover its cost plus expenditures without any notice to the terminated contractor (SE/Z). There is not a single case in the land that supports DPW's actions and position. Moreover, DPW's arguments run contrary to well settled, long standing, and basic Idaho Contract Law. *Selkirk Seed Co. v. State Ins. Fund*, 135 Idaho 434, 437,

18 P.3d 956, 959 (2000) (a contract must be read to give meaning to all parts, and cannot apply so as to render any provision meaningless).

Second, DPW elected a path early on in the litigation that put its stance in the instant litigation on a collision course with its own Contract and its own best interest in administering other public works contracts. The plain language of the Contract, which the District Court repeatedly found to be clear and unambiguous, required DPW to provide notice to SE/Z of the alleged defects and provide SE/Z with an opportunity to repair the defects prior to taking action against SE/Z. (R. Vol. II, pp. 373, 393, 396-398, 404, 413. Contract Articles 4.3.1, 12.2.2.1, and Supp. Condition 4.3.2.) In its expedience, DPW ignored its own Contract notice provision – the very sword it wields so frequently against claims brought against DWP by contractors in other litigation. Rather than accepting and applying the often used and plain language of the Contract, DPW propounded an interpretation of the Contract that is at direct odds with its plain meaning: DPW urged actual or strict compliance with the notice provisions of the Contract are not necessary where one can demonstrate (at trial) that the party opposing a claim had actual knowledge of the "claim" and lacked prejudice. Such an interpretation is something that most contractors would only blushingly argue. Despite the District Court's recognition that the Contract was clear and unambiguous, at DPW's repeated urging, the District Court allowed DPW latitude.

SE/Z respectfully submits that DPW's interpretation of the Contract, just like the erroneous interpretations of statutes at issue in *In re Elliott*, 141 Idaho 177, 184, 108 P.3d 324, 331 (2005), and

Fischer, 141 Idaho at 356, 109 P.3d at 1098 (where the unreasonable interpretations of unambiguous statutes were the basis for an award of fees under I.C. § 12-117), was an unreasonable action that lacked any basis in fact or law.[5]

In considering the application of I.C. § 12-117, this Court may also look to its decisions regarding awards of fees under I.C. § 12-121, because the standard for fees is substantially the same. *Nation v. State, Department of Correction*, 144 Idaho 177, 194, 158 P.3d 953, 970 (2007). ("Both I.C. § 12-117 and § 12-121 permit the award of attorney's fees to the prevailing party if the court determines the case was brought, pursued or defended frivolously, unreasonably or without foundation.") *See also Total Success Invs., LLC v. Ada County Hwy. Dist.*, 148 Idaho 688, 694-96, 227 P.3d 942, 948-950 (Ct. App. 2010) (quoting *Nation* and concluding that the reasoning for the District Court's denial of fees under section 12-121 was sufficient to support a denial of fees under section 12-117).

In contract cases under I.C. § 12-121, the Idaho Court of Appeals has concluded that a party's misinterpretation of a clear and unambiguous contract was frivolous, unreasonable or without foundation. In 1997, the Court of Appeals considered an award of attorney fees on appeal against a city, which award should have been analyzed under section 12-117, but was actually awarded under section 12-121. *Navarrette v. City of Caldwell*, 130 Idaho 849, 949 P.3d 547 (Ct. App. 1997). There, a lease between the city and Alfaro required Alfaro to secure liability insurance that named

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[5] Perhaps even more fundamental to DPW's folly is the fact that its arguments, damages and "claims" were build on a fraudulent expert witness that even DPW tried to abandon on the eve of the first trial.

the city as an additional insured. Alfaro secured the policy, but when the city made a claim against the policy, the insurer denied the claim. The city argued that Alfaro breached "the spirit" of the agreement by refusing to indemnify or defend the city. *Id.* at 852, 949 P.3d at 600. On appeal, the Court of Appeals upheld summary judgment against the city, because the terms of the contract were clear and unambiguous and merely required Alfaro to secure the policy, which he did. *Id.* The court then awarded attorney fees on appeal to Alfaro for the same reason:

> Upon review, we conclude that the City's appeal has been brought without foundation. When a contract is clear and unambiguous, we are to use the plain meaning of the words, and we do not look to the intent of the parties. . . . The City . . . conceded at oral argument on appeal that Alfaro purchased normal liability insurance. Therefore, we are left with the abiding belief that the City has brought this appeal without foundation. The City, as a third-party beneficiary, has not demonstrated that any terms of the sublease are ambiguous and, as such, has failed to establish that there was a genuine issue of fact which would have made the District Court's grant of summary judgment improper. Under these circumstances, Alfaro is entitled to an award of attorney fees on appeal.

Id. at 853, 949 P.3d at 601. *See also Laight v. First Nat'l Bank*, 108 Idaho 211, 215, 697 P.2d 1225, 1229 (Ct. App. 1985) (awarding fees on appeal because the agreement was clear and unambiguous).

Here, as with the non-prevailing parties in *Navarette* and *Laight*, DPW presented an unreasonable interpretation of a clear and unambiguous contract, causing SE/Z to incur substantial costs and fees in opposition to DPW's claims that were based upon those unreasonable interpretations. Therefore, SE/Z should be awarded its fees as the prevailing party under section 12-117.

C. Even if SE/Z Was Not the Overall Prevailing Party over DPW, It is Entitled to an Award of Costs and Attorney Fees as a Partially Prevailing Party Against DPW Pursuant to Idaho Code § 12-117(2).

If this Court declines to hold that SE/Z is an overall prevailing party over DPW pursuant to I.C. § 12-117(1), SE/Z submits that the Court should at a minimum conclude that the District Court erred when it failed to conduct any analysis as to whether SE/Z should be awarded fees as a partially prevailing party under I.C. § 12-117(2).

Indeed, the District Court's findings required it to grant SE/Z an award of at least a portion of its attorney fees and costs. The District Court found that SE/Z prevailed in part, and that DPW's interpretations of the contract were unfounded, but it failed to conduct the partial prevailing party analysis required by section 12-117(2). Section 12-117(2) requires an award of fees and costs even to a party who prevailed on only a portion of the case, as a partially prevailing party, if the non-prevailing party "acted without a reasonable basis in fact or law" on that portion of the case. I.C. § 12-117(2).

As explained above, DPW acted without a reasonable basis in fact or law in pursuing its claims against SE/Z and Hobson. In order to maintain its claims, DPW repeatedly argued unsupportable interpretations of the clear and unambiguous Contract drafted by DPW. DPW's contract interpretations were in direct conflict with the plain and unambiguous language of the contract. Unlike an analysis under section 12-121, the court is required in the analysis under section 12-117(2) to segregate the various claims where there are partially prevailing parties. *Roe v. Harris*,

128 Idaho 569, 573-74, 917 P.2d 403, 407-08 (1996); I.C. § 12-117(2). If the non-prevailing party acted without a reasonable basis in that portion the case, fees should be awarded with regard to that portion. *Id.*

SE/Z and Hobson both incurred vast amounts of costs and attorney fees in their defense against the counterclaim and cross-claim and in their efforts to defeat DPW's erroneous interpretations of the Contract. SE/Z respectfully requests that this Court conclude, on free review, that SE/Z is entitled to an award of attorney fees and costs incurred in relation to DPW's counterclaim and cross-claim and in disputing DPW's strained and meritless interpretations of the Contract.

D. Even If this Court Were to Apply an Abuse of Discretion Standard, the District Court Committed Reversible Error By Failing to Conclude That SE/Z Was the Prevailing Party, Whether in Whole or in Part, and Failing to Award SE/Z its Attorney Fees and Costs under Either Subsection (1) or (2) of I.C. § 12-117.

When examining whether a District Court abused its discretion, this Court considers whether the District Court: (1) perceived the issue as one of discretion; (2) acted within the outer boundaries of that discretion and consistently within the applicable legal standards; and (3) reached its decision by an exercise of reason. *See, Jorgensen v. Coppedge*, 148 Idaho 536,538 224 P.3d 1125 (2010), *citing, Shore v. Peterson, supra*, at 915.

The District Court acted outside the boundaries of any applicable discretion by failing to correctly apply the prevailing party analysis and by failing to determine whether DPW acted

without a reasonable basis in fact or law, as required by I.C. § 12-117(1) and (2). The District Court's conclusion that DPW prevailed in part against SE/Z is not supported by the record. DPW's only "victory" over SE/Z was in limiting a few items of SE/Z's damages. It never succeeded in having *any* of SE/Z's causes of action dismissed. Conversely, *all* of DPW's claims against SE/Z —seeking around $3 million— were dismissed.

Moreover, DPW's ultimate payment of $225,000 to SE/Z prior to the second trial, cannot be considered a victory for DPW by any stretch. There simply are no facts or circumstances from which the District Court could have reasonably concluded that DPW prevailed in any significant measure against SE/Z. Therefore, its determination that DPW and SE/Z both prevailed in part was not based upon an exercise of reason, nor was it consistent with the IRCP 54 guidelines for determining a prevailing party, as addressed above.

The District Court also failed to exercise any reason with regard to an award of attorney fees and costs pursuant to I.C. § 12-117. After concluding that SE/Z prevailed in part, the court made no analysis regarding SE/Z's and Hobson's arguments that DPW acted without a reasonable basis in fact or law, nor did the District Court even acknowledge that such an inquiry was necessary under section 12-117. The District Court's failure to consider the requirements of section 12-117 establishes both a lack of reason and a failure to correctly apply legal standards. The District Court abused its discretion in failing to award attorney fees and costs to SE/Z.

V. CONCLUSION

Based upon the foregoing, SE/Z respectfully requests that this Court reverse the District Court's Order regarding the prevailing party under I.C. § 12-117, and hold that SE/Z was the prevailing party entitled to an award of its costs and attorneys fees.

DATED this 20 day of July, 2011.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

By: John A Bailey
JOHN A. BAILEY

DATED this 20th day of July, 2011.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

By: _____
FREDERICK J. HAHN, III

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of July, 2011, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

David M. Penny COSHO HUMPHREY, LLP P.O. Box 9518 Boise, Idaho 83707	[✓] U. S. Mail Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [ ] Facsimile
J. Todd Henry Traeger Machetanz OLES MORRISON RINKER & BAKER LLP 701 Pike Street, Suite 1700 Seattle, WA 98101-3930	[✓] U. S. Mail Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [ ] Facsimile
Phillip S. Oberrecht HALL FARLEY OBERRECHT & BLANTON, PA 702 West Idaho, Suite 700 P.O. Box 1271 Boise, Idaho 83701	[✓] U. S. Mail Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [ ] Facsimile

JOHN A. BAILEY, JR.

Addendum 1

Architect's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

4.2.8 The Architect will prepare Change Orders and Construction Change Directives, and may authorize minor changes in the Work as provided in Paragraph 7.4.

4.2.9 The Architect will conduct inspections to determine the date or dates of Substantial Completion and the date of final completion, will receive and forward to the Owner, for the Owner's review and records, written warranties and related documents required by the Contract and assembled by the Contractor, and will issue a final Certificate for Payment upon compliance with the requirements of the Contract Documents.

4.2.10 If the Owner and Architect agree, the Architect will provide one or more project representatives to assist in carrying out the Architect's responsibilities at the site. The duties, responsibilities and limitations of authority of such project representatives shall be as set forth in an exhibit to be incorporated in the Contract Documents.

4.2.11 The Architect will interpret and decide matters concerning performance under and requirements of, the Contract Documents on written request of either the Owner or Contractor. The Architect's response to such requests will be made in writing within any time limits agreed upon or otherwise with reasonable promptness. If no agreement is made concerning the time within which interpretations required of the Architect shall be furnished in compliance with this Paragraph 4.2, then delay shall not be recognized on account of failure by the Architect to furnish such interpretations until 15 days after written request is made for them.

4.2.12 Interpretations and decisions of the Architect will be consistent with the intent of and reasonably inferable from the Contract Documents and will be in writing or in the form of drawings. When making such interpretations and initial decisions, the Architect will endeavor to secure faithful performance by both Owner and Contractor, will not show partiality to either and will not be liable for results of interpretations or decisions so rendered in good faith.

4.2.13 The Architect's decisions on matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents.

4.3 CLAIMS AND DISPUTES

4.3.1 Definition. A Claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. Claims must be initiated by written notice. The responsibility to substantiate Claims shall rest with the party making the Claim.

4.3.2 Time Limits on Claims. Claims by either party must be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. Claims must be initiated by written notice to the Architect and the other party.

4.3.3 Continuing Contract Performance. Pending final resolution of a Claim except as otherwise agreed in writing or as provided in Subparagraph 9.7.1 and Article 14, the Contractor shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Contract Documents.

4.3.4 Claims for Concealed or Unknown Conditions. If conditions are encountered at the site which are (1) subsurface or otherwise concealed physical conditions which differ

materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, then notice by the observing party shall be given to the other party promptly before conditions are disturbed and in no event later than 21 days after first observance of the conditions. The Architect will promptly investigate such conditions and, if they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment in the Contract Sum or Contract Time, or both. If the Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Architect shall so notify the Owner and Contractor in writing, stating the reasons. Claims by either party in opposition to such determination must be made within 21 days after the Architect has given notice of the decision. If the conditions encountered are materially different, the Contract Sum and Contract Time shall be equitably adjusted, but if the Owner and Contractor cannot agree on an adjustment in the Contract Sum or Contract Time, the adjustment shall be referred to the Architect for initial determination, subject to further proceedings pursuant to Paragraph 4.4.

4.3.5 Claims for Additional Cost. If the Contractor wishes to make Claim for an increase in the Contract Sum, written notice as provided herein shall be given before proceeding to execute the Work. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Paragraph 10.6.

4.3.6 If the Contractor believes additional cost is involved for reasons including but not limited to (1) a written interpretation from the Architect, (2) an order by the Owner to stop the Work where the Contractor was not at fault, (3) a written order for a minor change in the Work issued by the Architect, (4) failure of payment by the Owner, (5) termination of the Contract by the Owner, (6) Owner's suspension or (7) other reasonable grounds, Claim shall be filed in accordance with this Paragraph 4.3.

4.3.7 Claims for Additional Time

4.3.7.1 If the Contractor wishes to make Claim for an increase in the Contract Time, written notice as provided herein shall be given. The Contractor's Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay only one Claim is necessary.

4.3.7.2 If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that weather conditions were abnormal for the period of time, could not have been reasonably anticipated and had an adverse effect on the scheduled construction.

4.3.8 Injury or Damage to Person or Property. If either party to the Contract suffers injury or damage to person or property because of an act or omission of the other party, or of others for whose acts such party is legally responsible, written notice of such injury or damage, whether or not insured, shall be given to the other party within a reasonable time not exceeding 21 days after discovery. The notice shall provide sufficient detail to enable the other party to investigate the matter.

4.3.9 If unit prices are stated in the Contract Documents or subsequently agreed upon, and if quantities originally contemplated are materially changed in a proposed Change Order or Construction Change Directive so that application of such unit prices to quantities of Work proposed will cause substantial inequity to the Owner or Contractor, the applicable unit prices shall be equitably adjusted.

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4.3.10 Claims for Consequential Damages. The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes:

.1 damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and

.2 damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.

This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 14. Nothing contained in this Subparagraph 4.3.10 shall be deemed to preclude an award of liquidated direct damages, when applicable, in accordance with the requirements of the Contract Documents.

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4.4 RESOLUTION OF CLAIMS AND DISPUTES

4.4.1 Decision of Architect. Claims, including those alleging an error or omission by the Architect but excluding those arising under Paragraphs 10.3 through 10.5, shall be referred initially to the Architect for decision. An initial decision by the Architect shall be required as a condition precedent to mediation, arbitration or litigation of all Claims between the Contractor and Owner arising prior to the date final payment is due, unless 30 days have passed after the Claim has been referred to the Architect with no decision having been rendered by the Architect. The Architect will not decide disputes between the Contractor and persons or entities other than the Owner.

4.4.2 The Architect will review Claims and within ten days of the receipt of the Claim take one or more of the following actions: (1) request additional supporting data from the claimant or a response with supporting data from the other party, (2) reject the Claim in whole or in part, (3) approve the Claim, (4) suggest a compromise, or (5) advise the parties that the Architect is unable to resolve the Claim if the Architect lacks sufficient information to evaluate the merits of the Claim or if the Architect concludes that, in the Architect's sole discretion, it would be inappropriate for the Architect to resolve the Claim.

4.4.3 In evaluating Claims, the Architect may, but shall not be obligated to, consult with or seek information from either party or from persons with special knowledge or expertise who may assist the Architect in rendering a decision. The Architect may request the Owner to authorize retention of such persons at the Owner's expense.

4.4.4 If the Architect requests a party to provide a response to a Claim or to furnish additional supporting data, such party shall respond, within ten days after receipt of such request, and shall either provide a response on the requested supporting data, advise the Architect when the response or supporting data will be furnished or advise the Architect that no supporting data will be furnished. Upon receipt of the response or supporting data, if any, the Architect will either reject or approve the Claim in whole or in part.

4.4.5 The Architect will approve or reject Claims by written decision, which shall state the reasons therefor and which shall notify the parties of any change in the Contract Sum or Contract Time or both. The approval or rejection of a Claim by the Architect shall be final and binding on the parties but subject to mediation and arbitration.

4.4.6 When a written decision of the Architect states that (1) the decision is final but subject to mediation and arbitration and (2) a demand for arbitration of a Claim covered by such decision must be made within 30 days after the date on which the party making the demand receives the final written decision, then failure to demand arbitration within said 30

days' period shall result in the Architect's decision becoming final and binding upon the Owner and Contractor. If the Architect renders a decision after arbitration proceedings have been initiated, such decision may be entered as evidence, but shall not supersede arbitration proceedings unless the decision is acceptable to all parties concerned.

4.4.7 Upon receipt of a Claim against the Contractor or at any time thereafter, the Architect or the Owner may, but is not obligated to, notify the surety, if any, of the nature and amount of the Claim. If the Claim relates to a possibility of a Contractor's default, the Architect or the Owner may, but is not obligated to, notify the surety and request the surety's assistance in resolving the controversy.

4.4.8 If a Claim relates to or is the subject of a mechanic's lien, the party asserting such Claim may proceed in accordance with applicable law to comply with the lien notice or filing deadlines prior to resolution of the Claim by the Architect, by mediation or by arbitration.

4.5 MEDIATION

4.5.1 Any Claim arising out of or related to the Contract, except Claims relating to aesthetic effect and except those waived as provided for in Subparagraphs 4.3.10, 9.10.4 and 9.10.5 shall, after Initial decision by the Architect or 30 days after submission of the Claim to the Architect, be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party.

4.5.2 The parties shall endeavor to resolve their Claims by mediation which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Mediation Rules of the American Arbitration Association currently in effect. Request for mediation shall be filed in writing with the other party to the Contract and with the American Arbitration Association. The request may be made concurrently with the filing of a demand for arbitration but, in such event, mediation shall proceed in advance of arbitration or legal or equitable proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order.

4.5.3 The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

4.6 ARBITRATION

4.6.1 Any Claim arising out of or related to the Contract, except Claims relating to aesthetic effect and except those waived as provided for in Subparagraphs 4.3.10, 9.10.4 and 9.10.5, shall, after decision by the Architect or 30 days after submission of the Claim to the Architect, be subject to arbitration. Prior to arbitration, the parties shall endeavor to resolve disputes by mediation in accordance with the provisions of Paragraph 4.5.

4.6.2 Claims not resolved by mediation shall be decided by arbitration which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect. The demand for arbitration shall be filed in writing with the other party to the Contract and with the American Arbitration Association, and a copy shall be filed with the Architect.

4.6.3 A demand for arbitration shall be made within the time limits specified in Subparagraphs 4.4.6 and 4.6.1 as applicable, and in other cases within a reasonable time after the Claim has arisen, and in no event shall it be made after the date when institution of legal or equitable proceedings based on such Claim would be barred by the applicable statute of limitations as determined pursuant to Paragraph 13.7.

4.6.4 Limitation on Consolidation or Joinder. No arbitration arising out of or relating to the Contract shall include, by consolidation or joinder or in any other manner, the Architect, the Architect's employees or consultants, except by written consent containing specific reference to the Agreement and signed by the Architect, Owner, Contractor and any other person or entity sought to be joined. No arbitration shall include, by consolidation or joinder or in any other manner, parties other than the Owner, Contractor, a separate contractor as described in Article 6 and other persons substantially involved in a common question of fact or law whose presence is required if complete relief is to be accorded in arbitration. No person or entity other than the Owner, Contractor or a separate contractor as described in Article 6 shall be included as an original third party or additional third party to an arbitration whose interest or responsibility is insubstantial. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of a Claim not described therein or with a person or entity not named or described therein. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to the Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

4.6.5 Claims and Timely Assertion of Claims. The party filing a notice of demand for arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to be demanded.

4.6.6 Judgment on Final Award. The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

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ARTICLE 5 SUBCONTRACTORS

5.1 DEFINITIONS

5.1.1 A Subcontractor is a person or entity who has a direct contract with the Contractor to perform a portion of the Work at the site. The term "Subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Subcontractor or an authorized representative of the Subcontractor. The term "Subcontractor" does not include a separate contractor or subcontractors of a separate contractor.

5.1.2 A Sub-subcontractor is a person or entity who has a direct or indirect contract with a Subcontractor to perform a portion of the Work at the site. The term "Sub-subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Sub-subcontractor or an authorized representative of the Sub-subcontractor.

5.2 AWARD OF SUBCONTRACTS AND OTHER CONTRACTS FOR PORTIONS OF THE WORK

5.2.1 Unless otherwise stated in the Contract Documents or the bidding requirements, the Contractor, as soon as practicable after award of the Contract, shall furnish in writing to the Owner through the Architect the names of persons or entities (including those who are to furnish materials or equipment fabricated to a special design) proposed for each principal portion of the Work. The Architect will promptly reply to the Contractor in writing stating whether or not the Owner or the Architect, after due investigation, has reasonable objection to any such proposed person or entity. Failure of the Owner or Architect to reply promptly shall constitute notice of no reasonable objection.

5.2.2 The Contractor shall not contract with a proposed person or entity to whom the Owner or Architect has made reasonable and timely objection. The Contractor shall not be required to contract with anyone to whom the Contractor has made reasonable objection.

5.2.3 If the Owner or Architect has reasonable objection to a person or entity proposed by the Contractor, the Contractor shall propose another to whom the Owner or Architect has no

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11.5.2 Upon the request of any person or entity appearing to be a potential beneficiary of bonds covering payment of obligations arising under the Contract, the Contractor shall promptly furnish a copy of the bonds or shall permit a copy to be made.

ARTICLE 12 UNCOVERING AND CORRECTION OF WORK

12.1 UNCOVERING OF WORK

12.1.1 If a portion of the Work is covered contrary to the Architect's request or to requirements specifically expressed in the Contract Documents, it must, if required in writing by the Architect, be uncovered for the Architect's examination and be replaced at the Contractor's expense without change in the Contract Time.

12.1.2 If a portion of the Work has been covered which the Architect has not specifically requested to examine prior to its being covered, the Architect may request to see such Work and it shall be uncovered by the Contractor. If such Work is in accordance with the Contract Documents, costs of uncovering and replacement shall, by appropriate Change Order, be at the Owner's expense. If such Work is not in accordance with the Contract Documents, correction shall be at the Contractor's expense unless the condition was caused by the Owner or a separate contractor in which event the Owner shall be responsible for payment of such costs.

12.2 CORRECTION OF WORK

12.2.1 BEFORE OR AFTER SUBSTANTIAL COMPLETION

12.2.1.1 The Contractor shall promptly correct Work rejected by the Architect or failing to conform to the requirements of the Contract Documents, whether discovered before or after Substantial Completion and whether or not fabricated, installed or completed. Costs of correcting such rejected Work, including additional testing and inspections and compensation for the Architect's services and expenses made necessary thereby, shall be at the Contractor's expense.

12.2.2 AFTER SUBSTANTIAL COMPLETION

12.2.2.1 In addition to the Contractor's obligations under Paragraph 3.5, if, within one year after the date of Substantial Completion of the Work or designated portion thereof or after the date for commencement of warranties established under Subparagraph 9.9.1, or by terms of an applicable special warranty required by the Contract Documents, any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Contractor shall correct it promptly after receipt of written notice from the Owner to do so unless the Owner has previously given the Contractor a written acceptance of such condition. The Owner shall give such notice promptly after discovery of the condition. During the one-year period for correction of Work, if the Owner fails to notify the Contractor and give the Contractor an opportunity to make the correction, the Owner waives the rights to require correction by the Contractor and to make a claim for breach of warranty. If the Contractor fails to correct nonconforming Work within a reasonable time during that period after receipt of notice from the Owner or Architect, the Owner may correct it in accordance with Paragraph 2.4.

12.2.2.2 The one-year period for correction of Work shall be extended with respect to portions of Work first performed after Substantial Completion by the period of time between Substantial Completion and the actual performance of the Work.

12.2.2.3 The one-year period for correction of Work shall not be extended by corrective Work performed by the Contractor pursuant to this Paragraph 12.2.

12.2.3 The Contractor shall remove from the site portions of the Work which are not in accordance with the requirements of the Contract Documents and are neither corrected by the Contractor nor accepted by the Owner.

12.2.4 The Contractor shall bear the cost of correcting destroyed or damaged construction, whether completed or partially completed, of the Owner or separate contractors caused by the Contractor's correction or removal of Work which is not in accordance with the requirements of the Contract Documents.

12.2.5 Nothing contained in this Paragraph 12.2 shall be construed to establish a period of limitation with respect to other obligations which the Contractor might have under the Contract Documents. Establishment of the one-year period for correction of Work as described in Subparagraph 12.2.2 relates only to the specific obligation of the Contractor to correct the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to the Contractor's obligations other than specifically to correct the Work.

12.3 ACCEPTANCE OF NONCONFORMING WORK

12.3.1 If the Owner prefers to accept Work which is not in accordance with the requirements of the Contract Documents, the Owner may do so instead of requiring its removal and correction, in which case the Contract Sum will be reduced as appropriate and equitable. Such adjustment shall be effected whether or not final payment has been made.

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ARTICLE 13 MISCELLANEOUS PROVISIONS

13.1 GOVERNING LAW

13.1.1 The Contract shall be governed by the law of the place where the Project is located.

13.2 SUCCESSORS AND ASSIGNS

13.2.1 The Owner and Contractor respectively bind themselves, their partners, successors, assigns and legal representatives to the other party hereto and to partners, successors, assigns and legal representatives of such other party in respect to covenants, agreements and obligations contained in the Contract Documents. Except as provided in Subparagraph 13.2.2, neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.

13.2.2 The Owner may, without consent of the Contractor, assign the Contract to an institutional lender providing construction financing for the Project. In such event, the lender shall assume the Owner's rights and obligations under the Contract Documents. The Contractor shall execute all consents reasonably required to facilitate such assignment.

13.3 WRITTEN NOTICE

13.3.1 Written notice shall be deemed to have been duly served if delivered in person to the individual or a member of the firm or entity or to an officer of the corporation for which it was intended, or if delivered at or sent by registered or certified mail to the last business address known to the party giving notice.

13.4 RIGHTS AND REMEDIES

13.4.1 Duties and obligations imposed by the Contract Documents and rights and remedies available thereunder shall be in addition to and not a limitation of duties, obligations, rights and remedies otherwise imposed or available by law.

13.4.2 No action or failure to act by the Owner, Architect or Contractor shall constitute a waiver of a right or duty afforded them under the Contract, nor shall such action or failure to act constitute approval of or acquiescence in a breach thereunder, except as may be specifically agreed in writing.

action shall be deemed to have accrued in any and all events not later than the date of issuance of the final Certificate for Payment; and

.3 After Final Certificate for Payment. As to acts or failures to act occurring after the relevant date of issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of any act or failure to act by the Contractor pursuant to any Warranty provided under Paragraph 3.5, the date of any correction of the Work or failure to correct the Work by the Contractor under Paragraph 12.2, or the date of actual commission of any other act or failure to perform any duty or obligation by the Contractor or Owner, whichever occurs last.

ARTICLE 14 TERMINATION OR SUSPENSION OF THE CONTRACT

14.1 TERMINATION BY THE CONTRACTOR

14.1.1 The Contractor may terminate the Contract if the Work is stopped for a period of 30 consecutive days through no act or fault of the Contractor or a Subcontractor, Sub-subcontractor or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Contractor, for any of the following reasons:

.1 issuance of an order of a court or other public authority having jurisdiction which requires all Work to be stopped;

.2 an act of government, such as a declaration of national emergency which requires all Work to be stopped;

.3 because the Architect has not issued a Certificate for Payment and has not notified the Contractor of the reason for withholding certification as provided in Subparagraph 9.4.1, or because the Owner has not made payment on a Certificate for Payment within the time stated in the Contract Documents; or

.4 the Owner has failed to furnish to the Contractor promptly, upon the Contractor's request, reasonable evidence as required by Subparagraph 2.2.1.

14.1.2 The Contractor may terminate the Contract if, through no act or fault of the Contractor or a Subcontractor, Sub-subcontractor or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Contractor, repeated suspensions, delays or interruptions of the entire Work by the Owner as described in Paragraph 14.3 constitute in the aggregate more than 100 percent of the total number of days scheduled for completion, or 120 days in any 365-day period, whichever is less.

14.1.3 If one of the reasons described in Subparagraph 14.1.1 or 14.1.2 exists, the Contractor may, upon seven days' written notice to the Owner and Architect, terminate the Contract and recover from the Owner payment for Work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit and ~~damages~~.

and

14.1.4 If the Work is stopped for a period of 60 consecutive days through no act or fault of the Contractor or a Subcontractor or their agents or employees or any other persons performing portions of the Work under contract with the Contractor because the Owner has persistently failed to fulfill the Owner's obligations under the Contract Documents with respect to matters important to the progress of the Work, the Contractor may, upon seven additional days' written notice to the Owner and the Architect, terminate the Contract and recover from the Owner as provided in Subparagraph 14.1.3.

14.2 TERMINATION BY THE OWNER FOR CAUSE

14.2.1 The Owner may terminate the Contract if the Contractor:

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.1 persistently or repeatedly refuses or fails to supply enough properly skilled workers or proper materials;

.2 fails to make payment to Subcontractors for materials or labor in accordance with the respective agreements between the Contractor and the Subcontractors;

.3 persistently disregards laws, ordinances, or rules, regulations or orders of a public authority having jurisdiction; or

.4 otherwise is guilty of substantial breach of a provision of the Contract Documents.

14.2.2 When any of the above reasons exist, the Owner, upon certification by the Architect that sufficient cause exists to justify such action, may without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the Contractor's surety, if any, seven days' written notice, terminate employment of the Contractor and may, subject to any prior rights of the surety:

.1 take possession of the site and of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor;

.2 accept assignment of subcontracts pursuant to Paragraph 5.4; and

.3 finish the Work by whatever reasonable method the Owner may deem expedient. Upon request of the Contractor, the Owner shall furnish to the Contractor a detailed accounting of the costs incurred by the Owner in finishing the Work.

14.2.3 When the Owner terminates the Contract for one of the reasons stated in Subparagraph 14.2.1, the Contractor shall not be entitled to receive further payment until the Work is finished.

14.2.4 If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for the Architect's services and expenses made necessary thereby, and other damages incurred by the Owner and not expressly waived, such excess shall be paid to the Contractor. If such costs and damages exceed the unpaid balance, the Contractor shall pay the difference to the Owner. The amount to be paid to the Contractor or Owner, as the case may be, shall be certified by the Architect, upon application, and this obligation for payment shall survive termination of the Contract.

14.3 SUSPENSION BY THE OWNER FOR CONVENIENCE

14.3.1 The Owner may, without cause, order the Contractor in writing to suspend, delay or interrupt the Work in whole or in part for such period of time as the Owner may determine.

14.3.2 The Contract Sum and Contract Time shall be adjusted for increases in the cost and time caused by suspension, delay or interruption as described in Subparagraph 14.3.1. Adjustment of the Contract Sum shall include profit. No adjustment shall be made to the extent:

.1 that performance is, was or would have been so suspended, delayed or interrupted by another cause for which the Contractor is responsible; or

.2 that an equitable adjustment is made or denied under another provision of the Contract.

14.4 TERMINATION BY THE OWNER FOR CONVENIENCE

14.4.1 The Owner may, at any time, terminate the Contract for the Owner's convenience and without cause.

14.4.2 Upon receipt of written notice from the Owner of such termination for the Owner's convenience, the Contractor shall:

.1 cease operations as directed by the Owner in the notice;

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.2 take actions necessary, or that the Owner may direct, for the protection and preservation of the Work; and

.3 except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing subcontracts and purchase orders and enter into no further subcontracts and purchase orders.

14.4.3 In case of such termination for the Owner's convenience, the Contractor shall be entitled to receive payment for Work executed, and costs incurred by reason of such termination, along with reasonable overhead and profit on the Work not executed.

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AIA DOCUMENT A201 - 1997
GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION

The American Institute of Architects
1735 New York Avenue, N.W.
Washington, D.C. 20006-5292

4.2 Architect's Administration of the Contract

In subparagraph 4.2.1, delete from the first sentence "and will be the Owner's representative."

In subparagraph 4.2.2, delete from the first sentence "as a representative of the Owner".

Delete subparagraph 4.2.10 and substitute the following:

4.2.10 The Architect will provide a project representative and indicate the limitations of his authority during the construction of the Work. The Owner will assign a Project Manager to the project and will also assign a Field Representative who will observe the work and report to the Architect and the Owner's Project Manager.

4.3 Claims and Disputes

Delete subparagraph 4.3.2 and substitute the following:

4.3.2 Time Limits on Claims. A Claim by either party must be made by written notice to the Architect within ten (10) days from the date of the occurrence of the event or discovery of the condition giving rise to the Claim or within ten (10) days from the date that the Claimant knew or should have known of the event or condition. Unless the Claim is made within the aforementioned time requirements, it shall be deemed to be waived. The written notice of Claim shall include a factual statement of the basis for the Claim, pertinent dates, contract provisions offered in support of the Claim, additional materials offered in support of the Claim and the nature of the resolution sought by the Claimant. The Architect will not consider, and the Owner shall not be responsible or liable for, any Claims from subcontractors, suppliers, manufacturers, or other persons or entities not a party to this Contract. Once a Claim is made, the Claimant shall cooperate with the Architect and the party against whom the Claim is made in order to mitigate the alleged or potential damages, delay or other adverse consequences arising out of the condition.

Delete subparagraph 4.3.4 and substitute the following:

4.3.4 Concealed or Unknown Conditions. If conditions are encountered at the site which are subsurface or are otherwise concealed or unknown physical conditions which differ materially from those indicated in the Contract Documents or which were not reasonably susceptible of being disclosed by the Contractor's examination of the site in accordance with Subparagraph 4.3.4.1 of these Supplementary Conditions, then notice by the observing party shall promptly be given to the Architect and the other party before the conditions are disturbed and in no event later than ten (10) days after first observance of the conditions. The Architect will promptly investigate such conditions and, if they differ materially from the Contract Documents or if they were not reasonably susceptible of being disclosed by the Contractor's examination of the site, will recommend an equitable adjustment in the Contract Sum or Contract Time, or both, if the conditions cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Contract. If the Architect determines that the conditions at the site do not warrant an adjustment in the Contract terms, the Architect shall so notify the Owner and Contractor in writing, stating the reasons. If the Owner and the Contractor cannot agree on an equitable adjustment to the Contract terms or otherwise disagree with the determination of the Architect, the matter shall be subject to further proceedings in accordance with Paragraph 4.4.

Add to 4.3.4 the following:

4.3.4.1 The Contractor agrees and acknowledges that he has had sufficient time and opportunity to examine the Contract Documents and the site of the work in order to undertake any necessary actions to determine the character of the subsurface materials and site conditions to be encountered. No adjustment in the Contract Time or Contract Sum shall be permitted in connection with a subsurface, concealed or unknown site condition, which does not differ in any material respect from those conditions, disclosed or which reasonably should have been disclosed or identified by the Contractor's examination of the Contract Documents and the site of the work.

Add to 4.3.5 the following:

4.3.5.1 The Contractor shall not be entitled to an adjustment in Contract Time or in Contract Sum for any delay or failure of performance to the extent such delay or failure was caused by the Contractor or anyone for whose acts the Contractor is responsible. The Contractor shall be entitled to an equitable adjustment in Contract Time, and may be entitled to an equitable adjustment in Contract Sum, if the cost or time of Contractor's performance is delayed or changed due to the fault of the Owner. To the extent any delay or failure of performance was concurrently caused by the Owner and Contractor, the Contractor shall be entitled to an adjustment in the Contract Time for that portion of the delay or failure of performance that was concurrently caused, but shall not be entitled to an adjustment in Contract Sum. In the event that the Contractor is entitled to an adjustment in Contract Sum, the Owner will pay only for the following verifiable costs directly associated with the time extension or delay: 1) the actual labor costs, fringe benefits, employment taxes and insurance related to the Project Superintendent; 2) the cost associated with the fair rental value of the Project Superintendent's vehicle directly related to the time extension; 3) the direct costs attributable to the extension for the field office facility, including telephone lines, utilities, power, lights, water, and sewer (toilets). Mark-up on these costs will not be allowed. The Contractor shall make all reasonable efforts to prevent and mitigate the effects of any delay regardless of cause.

Add to 4.3.7 the following:

4.3.7.3 All Claims for costs related to Claims for additional time shall be pursuant to Paragraph 4.3. The Contractor shall not be entitled to make a Claim for adjustment in the Contract Sum based upon the matter of adverse weather conditions or force majeure.

4.4 Resolution of Claims and Disputes

In subparagraph 4.4.1, in the first sentence, delete "but excluding those arising under paragraphs 10.3 through 10.5". In the second sentence after ... Contractor and Owner, delete the rest of the sentence.

In subparagraph 4.4.2 delete actions (3), (4) and (5) and substitute the following:

(3) recommend approval of all or part of the Claim, or (4) attempt to facilitate the resolution of the Claim through informal negotiations.

In subparagraph 4.4.3, delete the last sentence.

In subparagraph 4.4.5, delete "and arbitration"

Delete subparagraph 4.4.6.

Delete subparagraph 4.4.8.

4.5 Mediation

In subparagraph 4.5.1 change "initial" to "final" and delete "or 30 days after submission of the Claim to the Architect".

In subparagraph 4.5.2 delete the last sentence.

4.6 Arbitration

Delete entirely all subparagraphs in 4.6 and substitute the following:

4.6.1 The Contractor and the Owner shall not be obligated to resolve any Claim or dispute related to this Contract by arbitration. Upon agreement of the parties and following the exhaustion of mediation, any Claim related to this Contract may be submitted to arbitration, either binding or non-binding, upon mutually agreeable terms and conditions. In the absence of such agreement, any reference in this Contract to arbitration is deemed void and has no force or effect.

ARTICLE 7 CHANGES IN THE WORK

7.2 Change Orders

Add to 7.2 the following:

7.2.2.1 The amount allowed for overhead and profit on any change order is limited to the amounts indicated in subparagraph 7.3.10 of these Supplementary Conditions.

7.2.3 Any Change Order prepared, including but not limited to those arising by reason of the parties' mutual agreement or by mediation, shall constitute a final and full settlement of all matters relating to or affected by the change in the work, including, but not limited to, all direct, indirect and consequential costs associated with such change and any and all adjustments to the Contract Sum and Contract Time. In the event a Change Order increases the Contract Sum, the Contractor shall include the work covered by such Change Order in the Application for Payment as if such work were originally part of the Project and Contract Documents.

7.2.4 By the execution of a Change Order, the Contractor agrees and acknowledges that he has had sufficient time and opportunity to examine the change in work which is the subject of the Change Order and that he has undertaken all reasonable efforts to discover and disclose any concealed or unknown conditions which may to any extent affect the Contractor's ability to perform in accordance with the Change Order. Aside from those matters specifically set forth in the Change Order, the Owner shall not be obligated to make any adjustments to either the Contract Sum or Contract Time by reason of any conditions affecting the change in work addressed by the Change Order, which could have reasonably been discovered or disclosed by the Contractor's examination.

7.3 Construction Change Directives

After subparagraph 7.3.1 add the following:

7.3.1.1 A Construction Change Directive, within limitations, may also be used to incorporate minor changes in the work agreed to by the Architect's representative, the Division of Public Works Field Representative, and the Contractor's Superintendent. The limits of these representatives' authority with

11.4.9 The Contractor shall pay Subcontractors their shares of the insurance proceeds received by the Contractor, and by appropriate agreements, written where legally required for validity, shall require Subcontractors to acknowledge the Owner's authority under this Paragraph 11.4 and make payments to their Sub-subcontractors in similar manner.

11.4.10 Nothing contained in this Paragraph 11.4 shall preclude the Contractor from obtaining solely at its own expense, insurance on its behalf.

Add to Article 11 the following:

11.6 Indemnity

11.6.1 The Contractor shall indemnify, defend and save harmless the Owner, the Architect, and the Architect's Consultants from and against all claims, damages, costs, legal fees, expenses, actions and suits whatsoever including injury or death of others or any employee of the Contractor, subcontractors, or the sub-subcontractors, agents or employees, caused by failure to comply fully with any term or condition of the Contract, or caused by damage to or loss of use of property, directly or indirectly, by the carrying out of the work, or caused by any matter or thing done, permitted or omitted to be done by the Contractor, his agents, subcontractors or employees and occasioned by the negligence of the Contractor, his agents, subcontractors or employees.

ARTICLE 12 UNCOVERING AND CORRECTION OF WORK

12.2 Correction of Work

In subparagraph 12.2.2.1 delete the second sentence.

ARTICLE 13 MISCELLANEOUS PROVISIONS

13.1 Governing Law

Add to 13.1 the following:

13.1.2 Each Contractor and his subcontractors and sub-subcontractors shall comply with all Idaho Statutes with specific reference to Public Works Contractor's State License Law, Title 54, Chapter 19, Idaho Code, as amended.

13.1.3 Pursuant to Sections 44-1001 and 44-1002, Idaho Code, it is provided that each Contractor "must employ ninety-five percent (95%) bona fide Idaho residents as employees, except where under such contracts fifty or less persons are employed, the Contractor may employ ten percent (10%) non-residents, provided, however, in all cases employers must give preference to the employment of bona fide residents in the performance of said work, and no contract shall be let to any person, firm, association or corporation refusing to execute an agreement with the above-mentioned provisions in it; provided that in contracts involving the expenditure of Federal Aid Funds this act shall not be enforced in such a manner as to conflict with or be contrary to the federal statutes prescribing a labor preference to honorable discharged soldiers, sailors, or marines, prohibiting as unlawful any other preference or discrimination among citizens of the United States."

13.2 Successors and Assigns

In subparagraph 13.2.1, in the second sentence, delete "Except as provided in Subparagraph 13.2.2,".

Delete subparagraph 13.2.2.

13.6 Interest.

Delete subparagraph 13.6.1 and substitute the following:

13.6.1 Payments due and unpaid under the Contract Documents (21 days from date received by the Owner) shall bear no interest until thirty (30) days past due, thereafter they shall bear interest at the rate of eight percent (8%) per annum until the date of the check as posted by the State Controller.

13.7 Commencement of Statutory Limitation Period

Delete subparagraphs 13.7.1, 13.7.1.1, 13.7.1.2, and 13.7.1.3 and substitute the following:

13.7.1 As between the Owner and Contractor as to acts or failures to act, any applicable statute of limitations shall commence to run and any legal cause of action shall be deemed to have accrued in any and all events in accordance with Idaho law.

Add to Article 13 the following:

13.8 Equal Opportunity

13.8.1 The Contractor shall maintain policies of employment as follows:

13.8.1.1 The Contractor and the Contractor's Subcontractors shall not discriminate against any employee or applicant for employment because of race, religion, color, sex, age or national origin. The Contractor shall take affirmative action to insure that applicants are employed, and that employees are treated during employment without regard to their race, religion, color, sex, age or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the policies of non-discrimination.

13.8.1.2 The Contractor and the Contractor's Subcontractors shall, in all solicitation or advertisements for employees placed by them or on their behalf, state that all qualified applicants will receive consideration for employment without regard to race, religion, color, sex, age or national origin.

ARTICLE 14 TERMINATION OR SUSPENSION OF THE CONTRACT

14.1 Termination by the Contractor

In subparagraph 14.1.1, in the first sentence, delete the number "30" and substitute the number "60".

Delete subparagraphs 14.1.1.3 and 14.1.1.4.

Delete subparagraph 14.1.2.

In subparagraph 14.1.3 delete "or 14.1.2".

In subparagraph 14.1.3 delete the words "profit and damages" and substitute the words "and profit".

Delete subparagraph 14.1.4.

14.2 Termination by the Owner for Cause

In subparagraph 14.2.2.3 delete the last sentence.

14.4 Termination by the Owner for Convenience

Delete subparagraph 14.4.3 and substitute the following:

14.4.3 In the case of such termination for the Owner convenience, the Contractor shall be entitled to receive payment from the Owner on the same basis provided in Subparagraph 14.1.3, as modified.

END OF SUPPLEMENTARY CONDITIONS